

DECISION



28217

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE:

B-213188

DATE: May 14, 1984

MATTER OF:

Le Prix Electrical Distributors, Ltd.

DIGEST:

1. Where only evidence in the record indicates that the agency received protester's request for clarification of specifications the afternoon before the closing date for receipt of proposals, the agency acted reasonably by not responding to the request since there was insufficient time for a reply to reach prospective offerors before submission of their offers and there was no apparent need to issue a clarification.
2. Agency's refusal to respond to request for clarification of specifications by telephone is reasonable in that there was insufficient time to reach all offerors and it is discretionary to provide oral explanations.
3. Protest that there were deficiencies in solicitation specifications is untimely where filed after the closing date for receipt of proposals.

Le Prix Electrical Distributors, Ltd. protests the award of a contract under request for proposals (RFP) No. 600-201-83, issued by the Veterans Administration Medical Center, Long Beach, California, for fire alarm system components manufactured by Paraday, Inc. Le Prix contends that the procuring activity improperly failed to respond to its request for clarification of the specifications prior to the receipt of proposals. The protest is denied in part and dismissed in part.

The RFP, a small business set-aside, was issued on September 1, 1983, and it established September 22 as the closing date for the receipt of proposals. The solicitation incorporated Standard Form 33-A by reference, which provides at paragraph 3:

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"Any explanation desired by an offeror regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach offerors before the submission of their offers. Oral explanations or instructions given before the award of the contract will not be binding."

Le Prix, whose offices are located in Ft. Lauderdale, Florida, mailed the contracting officer a memorandum dated September 15 in which it asked if it could provide a substitute for item No. 1 because Faraday no longer manufactures that item and requested verification of the model number for item No. 2. Le Prix further requested that "[s]ince time is of the essence, please telephone your response immediately." The VA states that the contracting officer, who was based at the medical center in Long Beach, received Le Prix's memorandum on September 21, the day before the closing date. The memorandum includes a handwritten notation apparently written by the contracting officer upon receipt which reads "Rec'd 9-21-83 approx 2:30 p.m. No envelope." This was the only request for clarification received.

The contracting officer determined that Le Prix's request for clarification was not made in sufficient time to allow for a reply to reach offerors before the submission of their offers and therefore the firm did not comply with the solicitation instructions. The contracting officer further determined that the subject of the requested clarification was not a problem because none of the other prospective offerors had any questions about the specifications in question. Thus, the contracting officer decided to receive offers as scheduled without responding to the request. Six offers--none from Le Prix--were received, five of which met the specifications, and the contract was awarded to Security & Fire Equipment Corporation.

Le Prix "find[s] it hard to believe" that its memorandum mailed on September 15 was not received by the VA until September 21 as the agency claims. It suggests that the VA disposed of the envelope in which its memorandum was sent because the envelope had the correct date of receipt stamped on it. Le Prix asserts that its memorandum was "probably" received by the VA on September 19, which would have allowed sufficient time for the agency to

investigate the questions raised and to then extend the closing date so that it could clarify the specifications for all prospective offerors.

The VA responds that Le Prix did not appear to be a serious prospective offeror because it raised questions that no one else had and it did not allow time for a response to its request. It maintains that Le Prix obviously knew of the requirements by September 15, the date of its memorandum, and thus had adequate time to expedite its inquiry. It suggests that Le Prix should have made its request by telephone and then confirmed it by telegram instead of mailing a memorandum cross-country only 5 working days prior to the closing date. The VA adds that it could not have provided Le Prix a response over the telephone as requested because oral explanations not confirmed in writing prior to award are precluded by the solicitation instructions and moreover, such a telephone conversation would have risen to the level of a "discussion" which would have required the agency to issue an amendment, thus delaying award. The VA concludes that it was not required to extend the closing date in order to issue a clarification because there was adequate competition, a reasonable price was received, and there was no deliberate attempt to exclude the protester.

While the agency does not offer any indication as to what happened to the envelope in which Le Prix's memorandum was sent, Le Prix merely speculates that the envelope was improperly disposed of and that the memorandum was actually received at an earlier date. It is not unreasonable that the memorandum was received on September 21, 4 working days after it was sent, as the agency asserts, in view of the fact that it was mailed from Florida to California. Since Le Prix has not introduced any evidence other than its own unsubstantiated statements to indicate that the memorandum was received before September 21, it has failed to meet its burden of affirmatively establishing its case. See Gas Turbine Corporation, B-210411, May 25, 1983, 83-1 CPD ¶ 566. Thus, we have no reason to believe that the memorandum was not in fact received until the afternoon before the closing date.

Le Prix never contends that 1 day was sufficient time to reach the prospective offerors about its request for clarification; in fact, by only contending that its memorandum was received earlier than the agency claims Le Prix seems to concede that 1 day was insufficient time.

Furthermore, we believe that the record supports the contracting officer's decision that 1 day was insufficient time to contact the prospective offerors about the request for clarification.

In determining whether 1 day was sufficient time to contact all of the prospective offerors, the contracting officer initially had to consider the ease with which prospective offerors could be reached. The contracting officer notified prospective offerors of this procurement in two ways: 1) by circulating the solicitation among local distributors of Faraday components, and 2) by publishing a synopsis of the requirement in the Commerce Business Daily. There were therefore a number of prospective offerors from various locations throughout the country (e.g., the awardee is based in Pennsylvania). Thus, we believe it was reasonable to decide that 1 day was insufficient time to contact all of them about the request for clarification before the submission of their offers and that consequently Le Prix did not act in accordance with the solicitation instructions.

In addition to the practical difficulties, the contracting officer also had to consider whether the specifications required clarification. Since Le Prix's was the only inquiry received and there was no problem readily apparent on the face of the specifications, we believe the contracting officer reasonably determined there was no need to delay the closing date and then issue a clarification. See Crimson Enterprises, Inc., B-209918.2, June 27, 1983, 83-2 CPD ¶ 24. We note that this decision was borne out after proposals were received when a Faraday sales representative informed the contracting officer that although item No. 1 was no longer being manufactured, sufficient quantities were available to meet the solicitation's requirements. Furthermore, adequate competition and a reasonable price were realized as five of the six offerors submitted acceptable offers and the contract was awarded for a price significantly below the government's estimate.

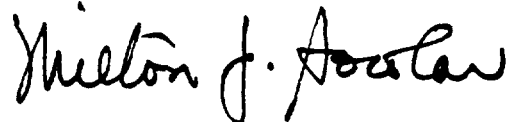
We further believe the contracting officer acted reasonably by not responding to the request for clarification by telephone. The failure to respond was not a deliberate attempt to exclude the protester; rather, as stated above, it was a reasonable response in light of the insufficient time to reach all prospective offerors. Furthermore, although, contrary to the agency's assertion, the solicitation instructions do not preclude oral explanations, they do not require such explanations

and only provide that oral explanations given before award will not be binding. The contracting officer therefore acted within her discretion by not giving oral advice and thus avoiding any possible misunderstandings. See Doane Building Corporation; Window Supply Co., B-211942, B-211942.2, Oct. 24, 1983, 83-2 CPD ¶ 480. We note that in Automated Informational Retrieval Systems, Inc., B-193931, June 19, 1979, 79-1 CPD ¶ 438, the agency chose to respond verbally to questions about the specifications raised by a protester only 1 day before bid opening and we stated that since the protester did not comply with the solicitation instructions it could not challenge the fairness or form of the agency response. Similarly Le Prix did not comply with the solicitation instructions and since the agency is not obligated to respond in any particular manner under such circumstances, it follows that the protester has no right to challenge the agency's decision not to respond verbally or otherwise.

Thus, we believe that the VA acted properly by proceeding with the receipt of offers as scheduled without responding to the request received only 1 day before the closing date.

We also note that in Le Prix's comments on the agency report filed with our Office on January 23, 1984, the protester appears to extend its protest to include the issues raised in its memorandum of September 15 to the agency, thus challenging the propriety of the specifications. A protest alleging improprieties apparent on the face of the solicitation must be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(b)(1) (1984). Thus, these issues which were raised 4 months after the closing date are dismissed as untimely. See AAA Engineering and Drafting, Inc., B-213108, Oct. 11, 1983, 83-2 CPD ¶ 442.

The protest is denied in part and dismissed in part.



Acting Comptroller General
— of the United States